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No. 95-1840

In the Supreme Court of the United States

OCTOBER TERM, 1995

EARL J. PARKER, JR., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 903(a), provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon the navigable waters of the United States * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer carrying out specified longshoring activities. The question presented is whether a container-repair shop near, but not immediately contiguous to, a marine terminal, is located in an "adjoining area" within the meaning of Section 903(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-XXIX) is reported at 75 F.3d 929. The decisions and orders of the Benefits Review Board (Pet. App. XXX-XXXIX) and the administrative law judge (Pet. App. XL-LI) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February, 9, 1996. A sua sponte suggestion of rehearing en banc was denied on March 14, 1996. Pet. App. LII-LIII. The petition for a writ of certiorari was

filed on May 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation to persons who meet a "status" requirement, *i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3),[1] and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). This case concerns the "situs" requirement, which appears in Section 3(a) of the Act and which specifies that the Act's coverage extends to

> injur[ies] occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioners Earl J. Parker, Jr., and Glenn Redmon are an inspector and mechanic, respectively, who suffered disabling injuries while working at a container-repair facility (the 24th Street facility) maintained by their employer, respondent Farrell Lines, Inc. Pet. App. III. Respondent is a worldwide ship line that transports containerized cargo to and

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[1] Section 2(3) of the Act defines "employee," with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

from various ports, including the Norfolk International Terminal (NIT). *Id.* at IV. Respondent owns the containers in which cargo is packed, and it inspects and repairs the containers as part of its shipping operations. *Ibid.*

Respondent's container inspection and repair work was performed exclusively at a leased space at NIT until 1980, when the Commonwealth of Virginia expanded the terminal and terminated respondent's lease. Pet. App. IV, XV. Respondent was thereafter able to continue to lease a small inspection and repair facility at NIT, but was compelled to transfer most of its operations to a new site on 24th Street in Norfolk, which is approximately five miles from the terminal and about one mile from navigable waters. *Ibid.* Respondent selected the 24th Street site "for a variety of reasons including proximity to [the terminal], the ease with which containers and employees could be moved between [the terminal] and the [facility], suitability of the site for container repair, and favorable lease terms." *Id.* at V. The site, which had previously been used for container repair, was the closest location to the terminal available, given zoning restrictions, and is located in a mixed-use area zoned for light industrial use. *Id.* at IV, XV, XLVIII-XLIX. Respondent's employees perform minor and ship-side repairs, as well as inspections, at NIT; major repairs (in addition to some minor repairs and inspections) are performed at the 24th Street facility. C.A. App. 13-14, 66-67.[2] While one employee is regularly assigned to NIT, repairmen from the 24th

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[2] Containers inspected and repaired at the 24th Street facility come from both the terminal and, over inland routes, from consignees. Pet. App. IV.

Street site are regularly dispatched to NIT, usually on a daily basis, to deliver parts, to conduct repairs, and to make inspections. Pet. App. IV, XV.

3. Petitioners sought compensation under the LHWCA from respondent for the injuries they sustained. Respondent conceded that petitioners met the LHWCA's "status" requirement because they were "engaged in maritime employment" by virtue of their work inspecting and repairing containers used for ocean transport and for over-the-road transfers to and from its terminal operations. Pet. App. V n.3, XLVII. Respondent contended, however, that its repair facility was not a covered "situs" under the Act, and it therefore paid petitioners only the lesser compensation provided by Virginia workers' compensation law. *Id.* at V.

In a consolidated decision on petitioners' LHWCA claims, an administrative law judge (ALJ) ruled that the repair shop was not a covered situs. Pet. App. XL-LI. Applying a four-factor test derived from the Ninth Circuit's decision in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978), the ALJ concluded that the site is not particularly suited for maritime uses; that adjoining properties are not primarily devoted to maritime uses; and that the site, while as close to the waterway as is feasible given all of the circumstances, is not close to a waterway. Pet. App. XLIX-L. The ALJ also emphasized that neither of the claimants had more than infrequent duty at the terminal during the last two years. *Id.* at L.

4. The Benefits Review Board affirmed. Pet. App. XXX-XXXIX. The Board approved the ALJ's use of the *Brady-Hamilton* "'functional relationship' test," noting that the Fourth Circuit had affirmed Board decisions employing that standard. *Id.* at XXXIII-

XXXIV. It rejected petitioners' contention that the ALJ had ignored the fact that the repair facility was the closest feasible site to the terminal, and it concluded that the ALJ had permissibly based its ruling against coverage on the other *Brady-Hamilton* factors, which weighed against coverage. *Id.* at XXXVI.

5. Petitioners sought review of the Board's decision in the United States Court of Appeals for the Fourth Circuit. On December 28, 1995, while their petition for review was pending, the Fourth Circuit issued its decision in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (1995), cert. denied, No. 95-1569 (June 24, 1996). The court in *Sidwell* held that a container–repair facility located eight-tenths of a mile from a waterfront terminal was not a covered situs under Section 3(a). 71 F.3d at 1141. The court explained that the "adjoining area" to which Section 903(a) refers must be "'contiguous with' or otherwise 'touch[]' [navigable] waters. If there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." 71 F.3d at 1138-1139 (footnote omitted). The court acknowledged that "dictionaries do include 'neighboring' and 'in the vicinity of' as possible definitions of 'adjoining,'" but it stated that "such is not the ordinary meaning of the word." *Id.* at 1138. The court also rejected the contention that "the word 'area' is sufficiently broad that the phrase 'adjoining area' still covers the site where Sidwell's injury occurred." *Id.* at 1139.[3] On January 29, 1996, the court of appeals sua

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[3] In a concurring opinion, District Judge Beaty stated that he would endorse the Ninth Circuit's *Brady-Hamilton* test and

sponte considered a suggestion for rehearing en banc in *Sidwell* and denied the suggestion in an eight to five vote.

6. Eleven days later, the court of appeals issued a decision in the instant case, holding that under *Sidwell* the 24th Street facility was not an LHWCA "situs." Pet. App. I-XXIX. In a quorum decision, both participating judges concluded that resolution of the case was controlled by *Sidwell*.[4] Judge Williams stated that "[b]ecause the 24th Street site neither is contiguous with navigable waters, nor touches such waters, nor is located within the boundaries of NIT, it cannot be a maritime situs under the LHWCA." *Id.* at VII. Judge Williams also stated that in her view, "*Sidwell* correctly rested on the plain language of the statute." *Id.* at IX.

Judge Murnaghan concurred, agreeing that under the approach employed in *Sidwell*, petitioners' injuries were not sustained at a maritime situs. He expressed the view, however, that *Sidwell* had articulated an unduly restrictive standard for resolving the situs inquiry. In Judge Murnaghan's view, the statute requires "a strong functional relationship between [navigable] waters and the site of the injury." Pet. App. XXII. He believed as well that "the word 'adjoining' encompasses not only a strict notion of contiguity, but also a more relaxed notion of two

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would affirm the ALJ's ruling under that standard. 71 F.3d at 1142-1143. In his view, the majority's construction of Section 3(a) rendered the "other adjoining area" phrase of the provision superfluous and was therefore incorrect. 71 F.3d at 1142.

[4] Justice Powell was a member of the panel that heard oral argument, but he did not participate in the decision. Pet. App. II n.1.

things being located within the general vicinity of each other." *Id.* at XXIV.

Judge Murnaghan also stated that "[t]he policy considerations underlying the passage of the 1972 Amendments [to the LHWCA] should further persuade us that the 24th Street facility is a covered situs," explaining that those amendments were intended to expand the Act's reach landward so as to reduce the frequency with which workers pass in and out of the Act's coverage. Pet. App. XXVI. He noted as well that a more expansive reading of the Act was supported by a 1977 memorandum issued by the Director of the Office of Workers' Compensation Programs (OWCP).[5] *Id.* at XXVII-XXVIII. Judge Murnaghan concluded:

> Given the strong functional relationship existing between the NIT and 24th Street facilities, the remedial objectives spurring passage of the 1972 Amendments, our duty to interpret the Act broadly so that those objectives may be achieved, and the Director's long-standing reasonable interpretation of the amended Act, we should hold that Petitioners sustained their respective injuries at a covered maritime situs.

Id. at XXVIII-XXIX.

The court of appeals subsequently considered sua sponte a suggestion of rehearing en banc and, in a seven to five vote, denied the suggestion. Pet. App. LII-LIII.

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[5] The Director of the OWCP was granted intervenor status in this case in the court of appeals, see Pet. App. X-XIII, and is therefore a respondent in this Court.

ARGUMENT

This case presents the same question as did the petition for a writ of certiorari in *Sidwell* v. *Express Container Services, Inc.*, No. 95-1569, which this Court denied on June 24, 1996. Essentially for the reasons stated in our brief in opposition in *Sidwell*, we believe that the petition in the instant case should also be denied.[6] If the court of appeals' opinion in *Sidwell* is read to require strict contiguity between a particular place of business and navigable waters, its holding creates a conflict among the circuits and would subvert the effective implementation of the LHWCA. We believe, however, that the opinion is susceptible of a more limited reading. Even if a square circuit conflict existed, moreover, the instant case would be an inappropriate vehicle for its resolution.

1. Prior to the Fourth Circuit's decision in this case, the courts of appeals had consistently held that a maritime facility may be covered by Section 903(a) even if it is not contiguous to navigable waters. See, *e.g.*, *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981). That view is consistent with the position of the OWCP, as articulated most formally in LHWCA Program Memorandum No. 58, at 10-11 (Aug. 10, 1977). See 95-1569 Gov't Br. in Opp. at 11-12. That view is also consistent with the history and purpose of Section 903(a), which indicate that the LHWCA's coverage may extend to a maritime facility that is not itself strictly contiguous

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[6] We have furnished counsel for the other parties in this case with a copy of our brief in opposition in *Sidwell*.

to navigable waters. See 95-1569 Gov't Br. in Opp. at 13-15. A rigid requirement that particular places of business be directly contiguous to navigable waters, by contrast, would "reenact the hard lines that caused longshoremen to move continually in and out of coverage * * * [and] frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity." *Texports Stevedore*, 632 F.2d at 514-515.

2. As we explain in our brief in opposition in *Sidwell* (see 95-1569 Br. in Opp. at 15-16), we do not believe that the Fourth Circuit has unambiguously articulated such a rigid rule. Until the Fourth Circuit has considered the application of Section 903(a) to a broader range of factual settings, we believe that review by this Court would be premature. We also believe that this case (like *Sidwell*) furnishes an inappropriate vehicle for resolution of any conflict that might be thought to exist. Both the ALJ and the Board applied a multi-factor test based upon the Ninth Circuit's decision in *Brady-Hamilton*, and both concluded that the facility where petitioners were injured was not a covered situs. See Pet. App. XXX-XXXIX, XL-LI. Although one member of the court of appeals panel reached the opposite conclusion, see *id.* at XXVIII-XXIX, it remains unclear whether petitioners could prevail even if the Court accepted their arguments with respect to the applicable legal standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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